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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-270

CLAUDE KELLEY, Director of the Department of Conservation, et al., etc.,

Petitioners

vs.

MOBIL OIL CORPORATION, a New York Corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOBIL OIL CORPORATION, a New York Corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on May 6, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A") is reported at 493 F. 2d 784.

The opinion of the District Court for the Southern District of Alabama (Appendix "B") is reported at 353 F. Supp. 582.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1974. A timely application for rehearing was denied on June 14, 1974. The jurisdiction of this Court is invoked under 28 U. S. C., §1254(1).

QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the United States Constitution prohibits Federal Courts from exercising pendent jurisdiction over actions on contracts against state officials.

2. Whether a substantial federal question was alleged in the District Court, and hence that Court had pendent jurisdiction over Mobil Oil's nonfederal claim.

3. Whether the District Court applied state law to Mobil Oil's nonfederal claim.

4. Whether when the Court of Appeals characterized the District Court's jurisdiction as pendent without remanding the case for application of state law, Petitioners were denied fairness as litigants.

5. Whether the pervasive principle of federal-state comity was impaired.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Section 14 of the Constitution of Alabama 1901 provides as follows:

> "That the State of Alabama shall never be made a defendant in any court of law or equity."

STATEMENT OF THE CASE

This suit, invoking federal question and diversity jurisdictions, was filed on August 9, 1972, by Mobil Oil Corporation against the Petitioners, the Alabama Department of Conservation and Claude Kelley, Director of the Department of Conservation; William J. Baxley, Attorney General of the State of Alabama; and the Alabama Oil and Gas Board and its members, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux. It arises out of four leases of land in Mobile Bay granted to Mobil Oil by the State of Alabama through the Alabama Department of Conservation. The District Court was asked, in the words of the Court,

". . . to extend the period of its lease with the State

> and to enjoin the defendants from failing to issue, or interfering with the issuance of, a valid drilling permit for the leased lands, and generally to grant such other relief as the plaintiff may show they are justly entitled to." Appendix B, p. 24.

The lease extension request was until such time as both the State Oil and Gas Board and the United States Corps of Engineers had issued valid permits for drilling on the leased lands. Petitioners moved to dismiss the complaint for lack of federal question and diversity jurisdictions.

On January 11, 1973, the District Court denied Petitioners' motions to dismiss, rendered an opinion finding that it had federal question jurisdiction, and entered an order granting the lease extensions requested by Mobil Oil.

Petitioners then filed an appeal attacking only the District Court's determination that it had federal question jurisdiction. On May 6, 1974, the Court of Appeals, though observing that the District Court acted upon only a nonfederal question, affirmed the decision of the District Court on the ground that the Court had pendent jurisdiction. Petitioners then filed a timely application for rehearing which was denied on June 14, 1974.

REASONS FOR GRANTING WRIT

I. *THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE MANY DECISIONS OF THIS COURT STATING THAT THE ELEVENTH AMENDMENT BARS ACTIONS ON CONTRACT AGAINST STATE OFFICERS IN FEDERAL COURTS.*

The decision below is in conflict with the decisions of

this Court in *Ex parte Young*, 209 U.S. 123 (1908-; *In re Ayers*, 123 U.S. 443 (1887); *Hans v. Louisiana*, 134 U.S. 1 (1890); and *State of Louisiana ex rel. Elliott v. Jumel*, 107 U.S 711 (1883). These decisions held that the Eleventh Amendment is effective in protecting states in federal court from suits on contracts to which they are parties.

However, the Court of Appeals attempted to circumvent this fundamental protection for states by invoking the rule articulated in *Ex parte Young, supra*, that state officials may be sued in federal courts on the ground that the state statutes under which they are acting are unconstitutional or on the ground that acts of the state officials go beyond federal constitutional bounds, whether or not the constitutionality of a state statute is involved. The Court of Appeals reasoned that since Mobil Oil alleged that Petitioner state officials acted unconstitutionally, the Eleventh Amendment barrier to its claim fell and the District Court was empowered to exercise both its federal question and pendent jurisdictions.

Petitioners respectfully submit that the Court of Appeals misapplied *Ex parte Young*. *Ex parte Young* excluded from its rule actions against state officials on contractual obligations. It specifically distinguished from its rule *In re Ayer, supra*, a case which it interpreted as involving, in reality, an action to compel specific performance by a state on a contract.

The reasons for this exception to the *Ex Parte Young* rule are found at the very heart of the Eleventh Amendment. The primary event leading up to the passage of the Amendment was the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1973), holding that a state was liable

in an action of assumpsit. In the words of Justice Rehnquist,

> "The decision in that case . . . literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was ratified by the final State necessary for passage." *Edelman v. Jordan*, 42 U.S.L.W. 4419 at 4422 (U.S. March 25, 1974.)

The principal reason for passage of the Amendment was to protect both the sovereignty of the states and the sanctity of their treasuries; the Amendment provided financial immunity, as well as sovereign immunity. 61 *Georgetown L. R.* 1473 at 1474.

Therefore, actions for award of money from state treasuries and actions on contract are understood as prohibited by the Eleventh Amendment; even *Ex parte Young* did not modify this fundamental prohibition. To this date this Court has refused to interfere, or allow other federal courts to interfere, in state fiscal and contractual matters. For example, on March 25, 1974, in *Edelman v. Jordan*, *supra*, this Court observed through Justice Rehnquist:

> "We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature. The Court's opinion in *Ex parte Young* hewed to no such line. Its citation of *Hagood v.*

Southern, 117 U.S. 52 (1886), and *In re Ayers*, 123 U.S. 443 (1887), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment." 42 U.S.L.W. at 4423.

This Eleventh Amendment bar to actions of contract against state officials should apply to federal courts exercising pendent jurisdiction, as well as, federal question or diversity jurisdiction, for the thrust of the bar is a broad prohibition on federal courts from interfering in state fiscal and contractual matters.

For these reasons, the Court of Appeals was incorrect in extending the application of *Ex parte Young* to actions on contract against state officials; and it was incorrect in affirming the decision of the District Court construing and extending the leases to which Petitioner state officials were parties.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH *UNITED MINE WORKERS V. GIBBS*, 383 U.S. 715 (1969).

In *United Mine Workers v. Gibbs*, 383 U.S. 175 (1969), this Court made several fundamental observations about pendent jurisdiction. It stated that a federal court may not exercise pendent jurisdiction over an alleged nonfederal claim unless a *substantial federal claim* is also alleged; it observed that *fairness to litigants* and *federal-state comity* are two basic considerations for federal courts in determining whether to exercise pendent jurisdiction; and it noted that when pendent jurisdiction is exercised, appropriate *state law* should be applied.

A. *Mobil Oil Failed to Allege a Substantial Federal Question.*

Mobil Oil alleged that the failure of Petitioner state officials to extend the leasing agreements violated the due process clause of the Fourteenth Amendment to the United States Constitution. This Court in *Manila Investment Co. v. Trammel*, 239 U.S. 31 (1915), rendered frivolous and insubstantial any claim that the actions of a state or its officers based on contractual agreements violated the due process clause. The issue before this Court was whether in an action for breach of contract to convey lands against the Board of Trustees of Florida State Improvement Funds, plaintiffs presented a real and substantial controversy involving a denial of due process. In concluding that no such constitutional controversy was presented, this Court observed:

> "An examination of the bill shows that the ground of recovery rests upon the allegation that the trustees contracted to convey the lands in question to the complainants, and afterwards, by formal resolution, the board repudiated its former action, and refused to recognize the alleged trust, and declared the complainants' title null and void. Complainants contend that this action by the trustees, as an agency of the State, in repudiation of its former action, and the conveyance of part of the land to others, in violation of the trust, constituted a taking of its property without due process of law, in violation of the provisions of the 14th Amendment. This is the only ground of Federal jurisdiction insisted upon.

> "The case presented no real and substantial controversy involving the construction or effect of the Federal Constitution. The allegations relied upon to give jurisdiction show a breach of contract merely, and bring the case within the principles decided by this court in *St. Paul Gaslight Co. v. St. Paul* 181 U.S. 142, 45 L. Ed. 788, 21 Sup. Ct. Rep. 575 (other cites omitted.)" 239 U.S. at 32 and 33.

Furthermore, *Manila Investment*, together with the many decisions of the Court stating that the Eleventh Amendment bars actions on contract against state officers in federal court, fully dispels any claim that actions on contract brought against state officers involve substantial due process issues. See page 4 of the Petition for a discussion of these Eleventh Amendment cases.

Finally, there are no factual allegations or findings supportive of a federal question. The Court of Appeals observed that though the order of the District Court was not addressed in terms to any state official, it must have been directed to the officials of the Department of Conservation since they were the only state officials who could actually grant the lease extensions — and, of course, as the Court of Appeals noted, the District Court had no jurisdiction over the State of Alabama itself, by virtue of the Eleventh Amendment. The Court of Appeals, therefore, logically concluded that whether there was federal question jurisdiction, and ultimately pendent jurisdiction, of Mobil Oil's claim against the officials of the Conservation Department was the crucial question.

Mobil Oil's complaint is devoid of any specific factual allegations supporting the claim that the Department of Conservation violated any of the rule and forms required by the due process clause; and the opinions of the Courts below are

devoid of any factual findings or even any discussions of alleged facts that would indicate a possible violation of due process. Therefore, there is absolutely no basis in the pleadings or the finding of fact for the federal question jurisdiction assumd by the District Court and for the pendent jurisdiction exercised by it.

B. *Alabama Law Was Not Applied to Mobil Oil's Nonfederal Claim.*

Although the Court of Appeals characterized the jurisdiction of the District Court as pendent, the District Court in its opinion discussed only federal question as the jurisdictional basis for the relief granted; it did not mention pendent jurisdiction. Furthermore, the District Court did not discuss or mention any Alabama law in its opinion. Therefore, it is evident from the opinion of the District Court alone that Alabama law was not applied to Mobil Oil's nonfederal claim.

Petitioners admit that the District Court was presented with briefs on state law, but they discussed only how Alabama law should be applied in a case of diversity jurisdiction, the other jurisdictional ground relied upon by Mobil Oil. The District Court acknowledged, however, that it did not consider the diversity jurisdictional claim and based its opinion solely on federal question, thereby logically implying that it did not consider applying state law either.

Nevertheless, the failure of the District Court to apply to Mobil Oil's claim is clearly evident from a careful consideration of Alabama law. Under Alabama law the doors of the state courts are firmly closed to suits based on state contracts against officials and agencies of the state. This

conclusion is well supported by state law and competent state authorities.

> The Constitution of Alabama 1901, Section 14, states: "That the State of Alabama shall never be made a defendant in any court of law or equity."

It should be noted that Section 14, as interpreted by the Alabama Courts, is broader than the Eleventh Amendment. It wholly withdraws from the state and the legislature, and other state authorities, any power to consent to suit against the state or waive its immunity. *Aland v. Graham*, 287 Ala. 226, 250 So. 2d 677 (1971).

In *Comer v. Bankhead*, 70 Ala. 493 (1881), a complainant sought specific performance of a contract by the warden of the state penitentiary and to enjoin the successor warden from breaching it. The Alabama Supreme Court held the contract to be one by the state as principal and denied relief on Section 14. Similarly, in *Wallace v. Malone*, 279 Ala. 93, 182 So. 2d. 360 (1964), a complainant sought in an action against state officials to enjoin cancellation of a state textbook depository contract. Again, the Alabama Supreme Court held the action was in effect one against the State of Alabama. They remarked:

> "In the instant case we are confronted with a bill, the object of which is by injunction, indirectly to compel the specific performance of a contract of the State, by forbidding all those acts and doings which constitute breach of contract. This may not be done." 279 Ala. at 98, 182 So. 2d at 363.

C. *Petitioners Were Denied Fairness as Litigants.*

Petitioners submit that they were denied fairness as

litigants when Mobil Oil, by merely invoking a federal court's pendent jurisdiction, escaped from state law on a purely state claim and achieved a result different from that possible in state courts. Such substantial variance in the rights and liabilities of litigants depending upon the choice of a forum is hardly desirable in a federal system of courts. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 at 532 (1928) (Justice Holmes' dissent). Therefore, a minimal requisite for fairness in this case would have been for the Court of Appeals to remand this case to the District Court for application of Alabama law.

D. *The Pervasive Principle of Federal-State Comity was Impaired.*

Federalism embodies:

> "a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37 at 44 (1971).

Alabama has legitimate as well as fundamental interests in the adjudication of nonfederal Alabama claims according to Alabama law in Alabama courts. These interests were infringed when Mobil Oil's claim, which was not cognizable in Alabama courts, was adjudicated in federal court as a pendent claim. To the extent that a party is permitted to escape from state law on a nonfederal claim, the greater

will be the friction and resentment between the federal government and the states. These ill effects of Mobil Oil's forum shopping are redolent of the times of *Swift v. Tyson*, 16 U.S. (Pet.) 1 (1842).

CONCLUSION

For these reasons the writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

MOBIL OIL CORPORATION, Plaintiff-Appelle,

v.

Claude KELLEY, Director of the Department of Conservation, et al., etc., Defendants-Appellants.

No. 73—1793.

United States Court of Appeals,

Fifth Circuit.

May 6, 1974.

Appealed from the United States District Court for the Southern District of Alabama.

Before BROWN, Chief Judge, GEWIN, Circuit Judge, and RUBIN, District Judge.

ALVIN B. RUBIN, District Judge:

Mobil Oil Corporation invoked federal question and diversity jurisdiction in a suit against the director and members of the Alabama Department of Conservation and the director and members of the Alabama Oil and Gas Board. The district court determined that it had jurisdiction, and decided in favor of Mobil on the merits. The defendants appeal only the trial court's determination that it had jurisdiction. The multiple issues presented by the effort to ascertain the answer to this apparently simple question require detailed analysis. But, to put the conclusion at the beginning, we decide that the district court had jurisdiction.

I. DETERMINATION OF JURISDICTION

[1, 2] Jurisdiction refers to the court's competency to consider a case. In essence, it is authority "to decide a given type of case one way or the other." Hagans v. Lavine, 1974, — U.S. —, 94 S.Ct. 1372, — L.Ed.2d —, 42 L.W. 4381. This is determined at the outset of the suit for reasons that are at least partially practical: the parties, the witnesses, and the public should not be put to the inconvenience and expense of a trial only to be told, after the trial is over, that they were in the wrong courthouse and must go to another for a new trial. Hence the determination whether a suit arises under the Constitution or laws of the United States rests upon "the plaintiff's statement of his own cause of action." Louisville & Nashville R. R. Co. v. Mottley, 1908, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126. See also Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Skelly Oil Co. v. Phillips Petro. Co., 1950, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194; Chandler v. O'Bryan, 10 Cir. 1971, 445 F.2d 1045; 1 Barron & Holtzoff, Federal Practice & Procedure § 25 (Wright ed. 1960).

[3] After jurisdiction has been determined to exist on the basis of the allegations of the complaint, the court has the power to decide the dispute between the parties even though the complainant ultimately fails to prove the cause of action on which jurisdiction was originally based. Bell, *supra;* Siler v. Louisville & Nashville R. Co., 1909, 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed. 753. Thus a complaint that alleges the existence of a federal question establishes jurisdiction, even though the court ultimately decides that the plaintiff's federal rights were not violated. Bell v. Hood, *supra;* Hagan v. Lavine, *supra;* Southern Pac. Co. v. Van Hoosear, 9 Cir. 1934, 72 F.2d 903; State of Georgia v Wenger,

7 Cir. 1951, 187 F.2d 285; Moore's Federal Practice 2.06[5].

II. SCOPE OF ELEVENTH AMENDMENT

[4] The State Immunity Amendment, adopted in 1798 as the Eleventh Amendment to the Constitution, prohibits the federal courts from hearing suits against one of the United States by a citizen of another state; it extends a like shield for actions against a state by its own citizens. Hans v. Louisiana, 1890, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842.

But this buckler has been limited to its exact constitutional width. As early as 1898, a bill to enjoin a state officer from executing an unconstitutional statute was held permissible, Smyth v. Ames, 1898, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, because it sought to prevent the officers from acting without authority. If the state statute authorizing the act was unconstitutional, it did no protect the state officer from suit. The action was only against the individual officer, not the state itself; though, as has been pointed out, this construction is anomalous, for the only basis for relief under the Fourteenth Amendment is that the action of the state officer is state action. McGuire v. Sadler, 5 Cir. 1964, 337 F.2d 902; C. Wright, Law of Federal Courts § 48.

[5] It is now rubric that state officials may be sued in federal court on the basis that the state statutes under which they are acting are unconstitutional. Ex Parte Young, 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; Alabama Pub. Ser. Comm'n v. Southern Ry. Co., 1951, 341

U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002.[1] By like reasoning the state's immunity has been held not to shelte. state officials from suit when it is claimed that their acts go beyond federal constitutional bounds, whether or not the constitutionality of the state statute is involved. Georgia Railroad & Banking Co. v. Redwine, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335. "A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual." Reagan v. Farmer's Loan & Trust Co., 1894, 154 U.S. 362, 14 S.Ct. 1047, 1051, 38 L.Ed. 1014. See also Alabama Public Service Comm., *supra;* Greene v. Louisville & Interurban R. Co., 1971, 244 U.S. 499, 37 S.Ct. 673, 61 L.Ed. 1280; Williams v. Eaton, 10 Cir. 1971, 143 F.2d 422; Duckworth v. James, 4 Cir. 1959, 267 F.2d 224; Peay v. Cox, 5 Cir. 1951, 190 F.2d 123; Cook v. Davis, 5 Cir. 1949, 178 F.2d 595.

III. THE COMPLAINT

In 1969 Mobil obtained four oil and gas leases on land in Mobile Bay from the Department of Conservation of the State of Alabama. Later it applied unsuccessfully to the State Oil and Gas Board for a permit to drill wells on lands covered by the leases. The complaint alleges that the issuance of such permits had always previously been routine.

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[1] Since the Supreme Court's decisions authorize the type of suit brought here as to Oil and Gas Department officials despite the Eleventh Amendment armor, we do not consider whether, in the jurisprudence of the 65 years since **Ex Parte Young, supra**, was decided, a broader compass is given the effect of the Fourteenth Amendment on the Eleventh. Griffin v. County Sch. Bd. of Prince Edward Co., 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256; Worchester County Trust Co. v. Riley, 1937, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 **(dictum)**; Louisiana St. Bd. of Ed. v. Baker, 5 Cir. 1964, 339 F.2d 911; McCoy v. Louisiana St. Bd. of Ed., 5 Cir. 1964, 332 F.2d 915.

and there was no legal reason for the Director and members not to follow the usual practice.

[6] The complaint, as amended prior to trial, is directed at state officials because, under the Eleventh Amendment, Mobil could not sue the State of Alabama or its agencies. While that part of the complaint focussed on the Oil and Gas Board does not plead a violation of federal constitutional rights in haec verba, it gives adequate notice of the existence of a claim that denial of the permit violated Mobil's rights to due process of law under the Fourteenth Amendment since, in addition to its other allegations, it recites, "Jurisdiction of this Court is invoked pursuant to and in accordance with 28 U.S. Code, Sections 1331 and 1332, and amendment 14, Section 1, to the Constitution of the United States." The notion that the Fourteenth Amendment itself confers jurisdiction is inartful, but the notice thus given is clear. The claim, as pleaded, is substantial, and the complaint was therefore sufficient to confer jurisdiction on the District Court as an action arising under the Constitution of the United States. 28 U.S.C. § 1331. Hagans v. Lavine, *supra*.

Following the general jurisdictional recital, the complaint alleges that ,when Mobil could not obtain a permit to drill from the Oil and Gas Board, it sought an extension of the leases from the State Conservation Department, with no results. It therefore also sued the director and members of the State Conservation Department. But Mobil nowhere alleged that the inaction of these officials violated any of its constitutional rights. Its sole contention with respect to the Conservation Department was, "There exists an actual and bona fide controversy between the parties as to whether the Director of the Department of Conservation is authorized

to toll the running of the primary term of said leases for the time that Mobil as Lessee is precluded by action or inaction of the State or any of its officers or agents from drilling on said leases, and, if he has such authority, whether or not he should grant such extension under the circumstances alleged herein." The relief requested as to the Director of the Department was a decree that he "has the power and right to grant an extension" and an order that he "extend the primary terms of the four leases for the period of time prayed for above, without the requirement of payment of delay rentals or other charges. . . ."

Hence neither the facts alleged nor the claims made suggested a contention that the failure of Conservation Department officials to extend the leases violated its constitutional rights. The defendants promptly challenged the court's jurisdiction alleging its lack generally as well as their contention that this was in effect a suit against the state, hence barred by the State Immunity Amendment.

Whether there was jurisdiction of the claim made against the officials of the Conservation Department, then, is crucial because the sole relief awarded by the District Court was to extend the obligation and payments under the leases until 3 years and 76 days after the Oil and Gas Board shall have issued a valid drilling permit, that being the period of the lease term remaining when the permit was sought; and to extend the terms of the leases until the Oil and Gas Board shall issue a valid drilling permit. The order is not addressed in terms to any state official, but it must be directed to the director and members of the Conservation Department since the Oil and Gas Board could not grant such an extension, and the court clearly had no jurisdiction as to the state itself by virtue of the State Immunity Amendment.

After considering the evidence, the trial court construed the complaint as contending that all of the defendants had taken the plaintiff's property without due process of law, in violation of the Fourteenth Amendment. The court considered that the complaint, thus interpreted, claimed that the officials of the Conservation Department, as well as the officials of the Oil and Gas Board, had denied Mobil due process of law, and that this claim was not wholly insubstantial or frivolous.

We need not dwell on whether the words of the complaint, standing alone, would be a sufficient key to the federal court. The construction given the pleadings by the trial court after hearing the evidence, was not clearly in error. Had the invocation been insufficient, the court could have permitted the allegation of jurisdiction to be amended, as, indeed, this court could now do. 28 U.S.C.A. § 1653. That therapeutic legislation, originally designed to permit belated amendment to allege diversity of citizenship, was extended in the 1948 code revision to permit amendment of all jurisdiction allegations. That the trial court decided that a federal question was alleged should not cause us to reconsider his conclusion merely because we might read the bare words of the complaint differently. Since he could have permitted them to be amended to assert a federal question with precision, we look to whether there was substantial error in his ultimate jurisdictional conclusion.

IV. PENDENT JURISDICTION

[*7-10*] Decision has created an extension to the jurisdiction of federal courts to meet the needs of equity to litigants and judicial economy. Jurisdiction may be based on the assertion of a federal claim but the claimant may be unable to prove his allegations; the evidence may however

prove a basis for relief under state law. In that event, a remedy may be granted by a federal court though a complaint based solely on the state claim would have been beyond the court's competency. Siler, supra; Wright, Federal Courts, § 19; See also Moor v. County of Alameda, 1973, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596. Similarly, where the complaint itself alleges a claim with respect to which federal courts are given jurisdiction and, in addition, a claim based on state law arising out of a common nucleus of operative fact, the federal court may adjudicate both claims in a single proceeding without requiring the parties to present the same facts to two different courts, United Mine Workers v. Gibbs, 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218; Hurn v. Oursler, 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148; Connecticut General Life Ins. Co. v. Croton, 5 Cir. 1968, 405 F.2d 41.[2]

"Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the laws of the United States, and Treaties

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[2] When jurisdiction is based on diversity of citizenship, the fundamental claim for relief is by definition based on state law. The issue of pendent jurisdiction arises when there is a lack of the requisite jurisdictional amount with respect to the pendent claim, when a case filed in state court is removed to federal court, or when it is sought to join in a pendent claim a new defendant—sometimes one with respect to whom diversity is lacking. Whether or not pendent jurisdiction lies in any of these situations is matter as yet undecided by this circuit. See, generally, Seyler v. Steuben Motors, Inc., 3 Cir. 1972, 462 F.2d 181; Hatridge v. Aetna Cas. & Sur. Co., 3 Cir. 1969, 415 F.2d 809; Stone v. Stone, 4 Cir. 1968, 405 F.2d 94; Campbell v. Triangle Corp., E.D.Pa.1972, 336 F.Supp. 1002; Sherrell v. Mitchell Aero, Inc., E.D.Wis.1971, 340 F.Supp. 219; Robison v. Castello, E.D.La.1971, 331 F.Supp. 667. If pendency of parties is extended to instances where federal jurisdiction is based on diversity, the long-held interpretation of the diversity statute as requiring complete diversity of parties would require reconsideration. See Strawbridge v. Curtis, 1806, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435.

made, or which shall be made, under their authority . . .,' U.S.Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103 [, 53 S.Ct. 549, 77 L.Ed. 515]. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." United Mine Workers v. Gibbs, *supra*, 383 U.S. at 725.

See also Hagans v. Lavine, *supra*,

[*11*] Since a substantial federal claim was stated against the director and members of both the Oil and Gas Board and the Conservation Department, there was pendent jurisdiction of the nonfederal claims on which the case was ultimately decided. We therefore do not need to address the question whether the assertion of federal question jurisdiction as to the officials of the Oil and Gas Board also conferred pendent jurisdiction of the claims against the officials of the Department of Conservation as additional parties.

This type of pendent jurisdiction has been called "pendent party" jurisdiction, to distinguish it from "pendent claim" jurisdiction, where the judicial power embraces only additional claims between the same parties. See Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 2 Cir. 1971, 441 F.2d 627; Leather's Best, Inc. v. S.S. Mormaclynx, 2 Cir. 1971, 451 F.2d 800; Almenares v. Wyman, 2 Cir. 1971, 453 F.2d 1075,

and Professor Jo Desha Lucas' comments in Supplement to Moore's Federal Practice, 18.07 (Supp.1972) and compare Williams v. U.S., 9 Cir. 1969, 405 F.2d 951, and Wojtas v. Village of Niles, 7 Cir. 1964, 334 F.2d 797. See also Shannon v. United States, 5 Cir. 1969, 417 F.2d 256, and Connecticut General Life Insurance Company v. Craton, 5 Cir. 1968, 405 F.2d 41; and Comment (1974) 20 Loyola L.Rev. 176. The Supreme Court recently considered the issue in Moor v. County of Alameda, 1973, 411 U.S. 693, 94 S.Ct. 1785, 36 L.Ed. 596, and, while recognizing a trend in the lower courts "to hear pendent claims involving pendent parties," chose not to decide the question.[3]

Mobil's claims against the officials of the two state departments was inextricably interwoven. They arose out of a common nucleus of operative fact. The trial court exercised its discretion wisely.

For those reasons, we conclude that the complaint as filed conferred federal question and consequent pendent jurisdiction over the director and members of the Oil and Gas Board and over the director and members of the Conservation Department.[4] The judgment of the district court is therefore affirmed.

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[3] "Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming **arguendo** the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits." Moor v. County of Alameda, 1973, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596.

[4] The invocation of diversity jurisdiction was therefore unnecessary. We do not mean by mentioning that plaintiff relied upon diversity of citizenship, to imply that this was appropriate. See, e. g. Ohio v. Wyandotte Chemicals Corp., 1971, 401 U.S. 493, 91 S.Ct. 1005, 28 L.Ed.2d 256; Harris v. Pennsylvania Turnpike Comm., 3 Cir. 1969, 410 F. 2d 1332.

APPENDIX B

MOBIL OIL CORPORATION, a New York Corporation, Plaintiff,

v.

Claude KELLEY, Director of the Department of Conservation, et al., Defendants.

Civ. A. No. 7277-72-P.

United States District Court, S. D. Alabama, S. D. Jan. 11, 1973.

JUDGMENT AND DECREE

PITTMAN, Chief Judge.

This suit was filed by Mobil Oil Corporation, as lessee from the State of Alabama of the oil and gas rights to certain parcels of land located in Mobile Bay, Alabama, seeking declaratory and injunctive relief. The defendants are the Alabama Department of Conservation and its Director, Claude Kelley, in his official capacity, the State Oil and Gas Board and its members, in their official capacities, the State Oil and Gas Board Supervisor, Philip E. LaMoreaux, in his official capacity, and the Attorney General for the State of Alabama, William J. Baxley, in his official capacity.

Specifically, plaintiff desires the court to extend the period of its lease with the State and to enjoin the defendants from failing to issue, or interfering with the issuance of, a

valid drilling permit for the leased lands, and generally to grant such other relief as the plaintiff may show they are justly entitled to.

[1] Jursidiction is alleged in this court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship), and Amendment Fourteen, Section 1, United States Constitution (deprivation of property without due process). Since defendants have challenged the jurisdiction of the court on both federal question and diversity of citizenship grounds, the issue of jurisdiction is the first which must be resolved.

Any discussion of federal question jurisdiction under 28 U.S.C. § 1331 must necessarily begin with the Supreme Court's pronouncements in Bell v. Hood, 327 U.S. 678, 681, 66 S.Ct. 773, 90 L.Ed. 939, 943 (1946):

> . . . where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.
>
> * * * * * * * * *
>
> The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

C. Wright, Federal Courts (1963), at page 55, states more succinctly, but no less emphatically, that "[D]ismissal for want of jursidiction is appropriate only where the fed-

eral claim is frivolous or a mere matter of form." (footnote omitted)

The complaint in this instance alleges that plaintiff's property has been taken without due process of law in contravention of Amendment Fourteen, Section 1 to the Constitution of the United States. It is claimed that the issuance of drilling permits was a routine administrative matter when Mobil entered into the leases and subsequent failure to issue the permit has deprived the plaintiff of the use of the property which was in the contemplation of the parties at the time of the bargaining.

Numerous courts through the years have sustained federal question jurisdiction in actions to enjoin the enforcement of conservation laws and orders of state agencies dealing with the production of oil and the classification of oil wells. *See*, Railroad Commission v. Rowan & N. Oil Co., 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); Henderson Co. v. Thompson, 12 F.Supp. 519 (D.C.Tex. 1935); Amazon Petroleum Corp. v. Railroad Comm., 5 F.Supp, 633 (E.D.Tex. 1934). Representative of the decisions in these cases and closer to the fact situation at bar are the opinions of Whittington v. Smith, 16 F.Supp. 448 (E.D.Tex.1936) and Lindsley v. Natural Carbonic Gas Co., 162 F. 954 (C.C.S.D.N.Y. 1908). In *Whittington, supra*, the district court ruled that federal question jurisdiction was present in a suit challenging a denial of a drilling permit to the owner of already producing land under a newly propagated state conservation law. The Second Circuit likewise upheld jurisdiction in a suit by the producer of carbonic gas which challenged a state conservation law. The law prevented the plaintiff from pumping the gas in the manner in which he was then currently engaged. Lindsley v. Natural Carbonic Gas, *supra*.

There are other cases which are factually similar to that presently before the court. Justice Brandeis, in Herkness v. Irion, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 (1928), found that the district court had jurisdiction in a suit questioning the validity under the Fourteenth Amendment, of an order of an administrative board of the state. The plaintiff, a manufacturer of carbon black from natural gas, was denied a permit on the sole ground of the policy recently announced by the Commissioner of Conservation not to issue any new permits and to gradually reduce those already outstanding. Before the new policy decree, it had been the custom to routinely issue the permits. Jurisdiction was affirmed in Merced Dredging Co. v. Merced County, 67 F.Supp. 598 (S.D.Cal. 1946) for a property owner's challenge of a newly enacted county ordinance which prohibited him from dredging on his land without a permit and dictated the manner in which any dredging was to be done.

A reading of these decisions amply demonstrates that plaintiff's claim is not "wholly insubstantial or frivolous" or made "solely for the purpose of obtaining . . . jurisdiction." This conclusion having been reached, the question need not to be reached as to whether jurisdiction also exists under 28 U.S.C § 1332.

FINDINGS OF FACT

Mobil Oil Corporation is a New York corporation with its principal place of business being located in New York and is qualified to do business in the State of Alabama. The defendants Claude Kelley, William J. Baxley, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux, are each over the age of 21 years of age and are citizens of the State of Alabama. Claude Kelley is the Director of the

Department of Conservation of the State of Alabama. William J. Baxley is the Attorney General of the State of Alabama, the chief legal officer for the State. Drexel Cook is Chairman and member of the State Oil and Gas Board of Alabama, Julian Maddox and Ralph Adams are members of the State Oil and Gas Board of Alabama, and Philip E. LaMoreaux is the State Oil and Gas Board Supervisor.

A hearing was held, evidence taken, arguments made and briefs submitted, and all parties have submitted on the complaint as last amended as to the merits of the case together with the injunctive relief sought.

In September, 1969, the Director of the Department of Conservation of the State of Alabama advertised for bids on leases on approximately 20,000 acres of water bottom property in Mobile Bay. Mobil was the highest bidder for these leases. On October 24, 1969, Mobil entered into oil and gas leases numbers 347, 348, 349, and 350 with the State of Alabama through the Department of Conservation for the purpose of oil and gas exploration in certain acreages of Mobile Bay. Each of the leases was duly executed by the Director of the Department of Conservation, approved by the Governor of the State of Alabama, and attested by the Secretary of State, all as required by Alabama statutory law. Each lease was for a five year term and as long thereafter as there was production of oil or gas from that lease. Drilling must be completed, however, within a two year period after the end of the primary term.

Mobil paid $78,822.00 as lease bonuses for the four leases and paid, on or before October 24th of 1970 and of 1971, $10,695.00 as delay rentals for each year as required by the terms of the leases. Mobil has also spent in excess

of $139,000.00 in evaluating the land covered by the leases as well as considerable inter-company time and expense.

The lease specifically granted to Mobil the right to drill on the property covered by the leases during the term of the leases.

On July 9, 1970, Mobil filed an application with the State Oil and Gas Board of Alabama for a permit to drill a well at a location in Mobile Bay covered by one of the said four leases. Up until the time of the filing of this application, such permits had been issued routinely by the Oil and Gas Board when the applicant qualified under the rules and regulations. At least two wells had previously been permitted and drilled in Mobile Bay prior to Mobil having made its application. Mobil's application has not been questioned.

Mobil requested a drilling permit from the U.S. Corps of Engineers as required by federal law, on July 17, 1970. No permit has been issued by either the Oil and Gas Board or the U. S. Corps of Engineers.

Mobil has requested the defendant Kelley, as the Director of the Department of Conservation, to grant extensions on the leases but was informed that he had no authority to do so.

Mobil has cooperated with the Oil and Gas Board and a committee suggested by the then Governor of Alabama to work on new rules and regulations to govern off shore drilling in Alabama waters. Up until the time of the hearing in this cause, the Oil and Gas Board has not adopted new rules and regulations for off shore drilling and had not issued Mobil a permit to drill.

Mobil has desired to drill a test well and has stood ready to proceed with such drilling since their application to drill was first made on July 9, 1970.

The defendant Baxley, as Attorney General, is the attorney for the Director of the Department of Conservation and for the Oil and Gas Board of Alabama. He has advised the Oil and Gas Board that he objects to the issuance of the requested drilling permit to Mobil and has also filed formal objections with the U. S. Corps of Engineers to its issuing a drilling permit to Mobil. The defendant Baxley has publicly announced that he is opposed to the drilling in Mobile Bay and he will fight it. He has not acted fraudulently or in bad faith, nor has he abused the discretion of his office.

The leases which are the subject of the litigation according to the terms therein, may be kept in force by the payment of delay rentals until October 24, 1974.

CONCLUSIONS OF LAW

[2] It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas.

In reliance on these leases, Mobil has expended large sums of money, has pursued all avenues of relief available

to it and has fulfilled its obligations under the lease. Since Mobil has been deprived of the right contemplated by the lease agreement, it is the opinion of this court that, as a matter of equity, and to prevent unjust enrichment of the State, Mobil is entitled to have the terms of the lease stayed for the period which it is delayed in obtaining drilling permits by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama.

[*3, 4*] The Attorney General of the State of Alabama has not unreasonably nor unlawfully interfered with the activities of the State Oil and Gas Board or the U. S. Corps of Engineers. He has wide discretion in determining what actions he should take in protecting what he conceives to be the best interest of the State of Alabama and the citizens thereof. The actions taken by him in the case at hand were an exercise of that discretion and in fulfillment of the duties of the office. An injunction is not warranted to prohibit him from taking action to prevent the issuing of the drilling permits requested by Mobil.

ORDER

It is therefore ordered, adjudged, and decreed that the leases, to wit, numbers 347, 348, 349, and 350, and the obligations and payments due thereunder should be, and from this date are hereby stayed until three (3) years and seventy-six (76) days after the Oil and Gas Board has issued a valid drilling permit.

It is further ordered, adjudged, and decreed that the terms of the leases, to wit, numbers 347, 348, 349, and 350, are extended by staying the running of the primary terms set out in each lease from August 9, 1970, until the date

the Oil and Gas Board issues a valid drilling permit and an additional two (2) years after the primary term if there is drilling.

The court retains jurisdiction of this cause and on petition of any party or by the court ex mero motu this cause may be set down for another hearing to fashion other and different relief in order to do justice between the parties according to law and equity.

Costs are taxed against the defendant Department of Conservation, State of Alabama.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1793

MOBIL OIL CORPORATION,
Plaintiff- Appellee,

versus

CLAUDE KELLEY, Director of the Department of Conservation, ET AL, Etc.,
Defendants—Appellants.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING
(June 14, 1974)

Before BROWN, Chief Judge, GEWIN, Circuit Judge and RUBIN, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SUPREME COURT, U. S.

OCT 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-270

CLAUDE KELLEY, Director of the Department of Conservation, et al., etc.,
Petitioners,

v.

MOBIL OIL CORPORATION, a New York Corporation,
Respondent.

REPLY BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-270

CLAUDE KELLEY, Director of the Department of Conservation, et al., etc.,
Petitioners,

v.

MOBIL OIL CORPORATION, a New York Corporation,
Respondent.

REPLY BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF THE ISSUES

1. Whether or not Petitioners have alleged sufficient reasons to confer on this Court jurisdiction to review the judgment or decree of the Fifth Circuit Court of Appeals by Writ of Certiorari?

2. Whether the Fifth Circuit Court of Appeals properly ruled that the United States District Court had jurisdiction in this case?

STATEMENT OF THE CASE

This suit was filed in the United States District Court for the Southern District of Alabama, on August 9, 1972, by Mobil Oil Corporation (hereinafter called Mobil). The suit arises out of four leases, numbered 347, 348, 349 and 350, of land in Mobile Bay granted, after competitive bidding, to Mobil by the Director of the Department of Conservation, and after approval by the Governor of the State of Alabama.

This suit sought among other relief, a declaratory judgment by the Court determining the rights of the parties under the terms of the certain oil and gas leases granted by the State of Alabama to Mobil. The suit sought preliminary and permanent injunctions against Claude Kelley and the Department of Conservation, from failing or refusing to grant an extension of time concerning the leases, and that the Court would order that the leases remain in a status quo position.

Additionally, the suit sought preliminary and permanent injunctions against the State Oil and Gas Board of Alabama, the members of the Board, Drexel Cook, Julian Maddox, Ralph Adams, and the Supervisor of the Board, Philip LaMoreaux, from failing and refusing to grant drilling permits to the plaintiff to drill wells on the property covered by the leases.

The suit also prayed that the Court would grant to Mobil such general relief as to which Mobil may be shown to be justly entitled.

On August 29, 1972, Defendants-Petitioners, Department of Conservation, Claude Kelley and William J. Baxley, filed a motion to dismiss the complaint. On September 29, 1972 the Court heard argument on the motion to dismiss and a hearing was held, evidence taken, arguments made and briefs submitted on Mobil's motion for a preliminary injunction. The jurisdiction

of the Court was questioned in the motion to dismiss filed by Defendants-Petitioners, and was fully argued and briefed.

The Court, after considering the evidence taken, arguments made and briefs submitted, entered an order on January 11, 1973, staying the obligations and payments due under the four (4) leases until three (3) years and seventy-six (76) days after the Oil and Gas Board has issued a valid permit, and the Court extended the terms of the four (4) leases by staying the running of the primary terms of the leases from August 9, 1970, until the date the Oil and Gas Board issues a valid drilling permit, and an additional two (2) years after the primary term, if there is drilling. The Court retained jurisdiction of the case. Costs were taxed against the Defendant, Department of Conservation, State of Alabama. (A copy of the District Court's Judgment and Decree is set out as Appendix "B" to the Petition for Writ of Certiorari, pages 24-32.)

On February 12, 1973, all Defendants-Petitioners filed a notice of appeal from so much of the Judgment and Decree of the District Court "as granted Plaintiff's claim for an injunction staying Plaintiff's obligation and payment due under leases and extending the leases by staying the primary terms of the leases."

The notice of appeal to the Fifth Circuit Court of Appeals did not raise the question of jurisdiction of the District Court.

The appeal was briefed and argued, and on May 6, 1974, the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the District Court, and ruled that the District Court had jurisdiction of the case. (See Appendix "A" of Petition for Writ of Certiorari for Court of Appeals opinion, pages 14-23).

An application for rehearing was filed by Petitioners, and an order was entered by the United States Court of Appeals for the

Fifth Circuit on June 14, 1974 denying the Petition for Rehearing. (See Appendix "C" of Petition for Writ of Certiorari, page 33).

STATEMENT OF THE FACTS

The "Findings of Fact" entered by the District Court in its order of January 11, 1973, correctly states the facts of the case, and the District Court's "Findings of Fact" are set out in full at pages 27-30 of Petitioner's Petition for Writ of Certiorari, and is incorporated herein by reference, as if fully set out herein.

ARGUMENT

The complaint filed in this case invoked jurisdiction in the District Court pursuant to 28 U.S.C. Sec. 1331 (Federal Question), 28 U.S.C. Sec. 1332 (Diversity of citizenship), and Amendment Fourteen, Sec. 1, United States Constitution (deprivation of property without due process).

A. The District Court Was Correct in Finding That It Had Federal Question Jurisdiction Under the "Due Process" Clause of the Fourteenth Amendment and the Fifth Circuit Court of Appeals Was Correct in Affirming the District Court's Jurisdiction.

After conducting a hearing, taking oral evidence, and considering arguments and briefs of law submitted by counsel for all parties, the District Court found that Mobil's complaint stated a case arising under federal law and a necessary implication of that finding is that Mobil would be deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, unless relief was given. On the appeal to the Fifth Circuit Court of Appeals the Petitioners joined issue only with the District Court's finding that there was federal jurisdiction over this controversy, and issue was not taken with the Judgment and Decree of the District Court after jurisdiction was found to exist. For the purposes of the appeal, it was taken, assuming proper jurisdiction, that the District Court's findings of fact, its application of the law to those facts, and its resulting Judgment and Decree based on those findings of fact and the law was correct and within its authority.

In finding that it had jurisdiction over this cause the District Court properly pointed out that any discussion of federal ques-

tion jurisdiction under 28 U.S.C. Section 1331[1] must necessarily begin with the Supreme Court's pronouncement in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> ". . . Where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.
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> * * * * * * *
>
> "The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

In citing the case of *Bell v. Hood*, Professor C. A. Wright notes in his Treatise on Federal Courts (1963) at page 55 that federal jurisdiction exists if the complaint states a case arising under federal law even though on the merits the complainant may be proved to have no federal right. Wright points out that if the claim is bad, then:

> "Judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not

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[1] § 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district courts may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

> give the right the party claims, it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction." *Wright on Federal Courts*, page 55.

In further considering Professor Wright's commentaries the District Court noted in this case that Professor Wright stated more succinctly but no less emphatically than the Supreme Court in *Bell v. Hood* that:

> "Dismissal for want of jurisdiction is appropriate only where the federal claim is frivolous or a mere matter of form."

The determination of whether or not a suit arises under the Constitution or laws of the United States rests upon "the plaintiff's statement of his own cause of action." *Louisville & Nashville RR Co. v. Mottley* (1908), 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126. See also other cases cited in the Fifth Circuit Opinion at page 15 of Petitioner's petition.

It would thus result that if Mobil's complaint stated a case arising under federal law that was not frivolous or a mere matter of form that the District Court would therefore have jurisdiction to consider Mobil's claim on its merits. In answering this question the District Court correctly looked to the verified complaint and noted that Mobil alleged that its property had been taken without due process of law in violation of the Fourteenth Amendment in that the State of Alabama acting through its Department of Conservation had, for a very substantial consideration, granted leases of certain water bottom property to Mobil for the express purpose of Mobil drilling for oil and gas on the leased property. The District Court also considered the evidence presented at the hearing concerning the actions or inactions by the Petitioners, arguments made and briefs submitted. The Court, in discussing the actions of the State, noted:

> "It is clear from the history of the Department of Conservation's issuance of permits under its oil and gas leases and from the content of the oil and gas leases in question, that it was contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. It would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas".

The District Court noted that the Oil and Gas Board had not issued a drilling permit to Mobil even though almost two years had elapsed since the filing of a proper application therefor, and even though Mobil's application had not been questioned. A drilling permit is a prerequisite before Mobil can commence drilling. Up until the time Mobil applied for the permit in the instant case the issuance of drilling permits by the State Oil and Gas Board was a routine administrative matter. As a matter of fact two permits to drill in Mobile Bay had been administratively granted by the Board's staff prior to Mobil's application. The failure of the Oil and Gas Board to issue the requisite drilling permit effectually deprived Mobil of its property right to drill for oil and gas on the leased property.

The District Court found that Mobil had been deprived of the property right granted by the lease agreements, and it was the opinion of the Court, that, as a matter of equity, and to prevent unjust enrichment of the State, that Mobil was entitled to the relief for which it had prayed, by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama.

The question of the actions or inaction of the Attorney General was clearly before the Court and the Court found that the Attorney General had not unreasonably nor unlawfully inter-

fered with the activities of the State Oil and Gas Board or the U. S. Corps of Engineers. This was a fact question for the Court, and the Court ruled on this question. The fact that the Court ruled that the Attorney General did not act improperly, does not take away jurisdiction. To hold otherwise would mean that after a case had been tried and defendant found not to be liable the case should have been dismissed in the beginning for lack of jurisdiction because the Court found that the Defendant did not do the act of which the plaintiff complained. This is not the law. (See *Wright, Federal Courts*, page 55, previously quoted at page 6 of this brief).

The District Court cited a number of cases[2] where the courts had sustained federal question jurisdiction in actions to enjoin the enforcement of conservation laws and orders of state agencies dealing with the production of oil and the classification of oil wells. It is respectfully submitted that even absent the cases cited by the District Court or even in the absence of any prior cases affirming federal question jurisdiction in situations similar to that presented by this case, that the facts of this case themselves are amply sufficient to support a finding of federal question jurisdiction under the authority of *Bell v. Hood*, supra.

The Petitioners attack the District Court's finding of federal question jurisdiction by taking the position that under the facts in this case the State, acting by and through its agencies, had in effect contracted with Mobil to lease certain property to Mobil, that in so acting the State placed itself in a non-governmental (or proprietary) capacity and that this suit therefore involves

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[2] *Railroad Commission v. Rowan & N. Oil Co.*, 310 U. S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); *Henderson Co. v. Thompson*, 12 F.Supp. 519 (D.C. Tex. 1935); *Amazon Petroleum Corp. v. Railroad Comm.*, 5 F.Supp. 633 (E.D. Tex. 1934); *Whittington v. Smith*, 16 F.Supp. 448 (E.D. Tex. 1936); *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. 954 (C.C.S.D.N.Y.) (1908); *Herkness v. Iron*, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 (1928); *Merced Dredging Co. v. Merced County*, 67 F.Supp. 598 (S.D. Cal. 1946).

nothing more than a breach of contract dispute between two private parties. (Petitioner's brief, pages 5-10). In support of this argument the Petitioners cite the case of *Manila Investment Co. v. Trammell,* 239 U.S. 31 (1915) (which will be later shown in this brief to be factually dissimilar from the case at bar) and proceed to sum up this point of their argument by asserting that the refusal of the Department of Conservation to extend the leases was merely an exercise of right based solely upon the leasing agreement between Mobil and the Department and that the right was analogous to any right a private party would have in a similar contract situation. In taking this position the Petitioners are apparently attempting to assert that the Department of Conservation's refusal to extend the leases is the only complaint made by Mobil and that an extension of the leases was the only relief sought. Whereas an order extending the term of the leases was ultimately entered by the District Court as being deemed by the Court to be the appropriate relief under the circumstances, such relief was by no means the only relief sought. It is clearly shown in Mobil's amended complaint that in addition to seeking an extension of the leases, Mobil prayed for injunctions restraining the Oil and Gas Board and its officials from refusing to issue drilling permits and for affirmative relief in the form of an order directing these defendants to issue drilling permits. It was most assuredly the actions, or inaction of the Oil and Gas Board, an agency of the State not a party to Mobil's lease, which was a major source of Mobil being unconstitutionally deprived of its property right.

The action also sought an injunction against all the defendants enjoining each of them from interfering in any way with Mobil's application to drill a well in Mobile Bay, and the actual drilling of such well or wells in Mobile Bay.

In the case of *Manila Investment Co. v. Trammell,* 239 U.S. 31 (1915), cited by the Petitioners in support of their proposition that federal question jurisdiction does not exist inasmuch as the

present suit allegedly involves a mere contractual or leasing agreement, this Court pointed out that the entire ground of recovery in that case rested upon the allegation that certain state officers had contracted to sell lands to the complainants and later repudiated that contract and sold the land to others. The case at bar differs factually from the *Manila* case, supra, inasmuch as there has been a conveyance of the leasehold interest to Mobil, a completed transaction. There has been no repudiation of the leases by the State or the Department of Conservation, nor is this suit a petition to merely interpret the meaning of the leases. The uncontested facts in the case are that the State, through its Department of Conservation, leased the property in question to Mobil for a substantial consideration, that the leases are still in force, and that another agency of the State, the Oil and Gas Board, has failed to issue the requisite drilling permit contemplated by both the Department of Conservation and Mobil at the time of the making of the leases. It is clear that the failure of the Oil and Gas Board to act to Mobil's application to drill is unconstitutionally depriving Mobil of its lease-hold rights to drill, for which Mobil had, to the date of the complaint, paid the State an amount in excess of $118,000.00. (The money was paid to the Department of Conservation, but under Title 26, Section 179(56o), *Code of Alabama* 1940 (Recompiled 1958) the money has been paid into the general fund of the State of Alabama.) A federal question would have been stated against the Oil and Gas Board members under the alleged circumstances if Mobil's leases had been acquired from a non-governmental source and if only the Oil and Gas Board members had been named as defendants. Surely this jurisdiction over the Oil and Gas Board members is not lost by the fact that the leases were sold to Mobil by an agency of the State of Alabama.

In conclusion, it appears that the Petitioner's primary argument in opposition to the District Court's finding that there is federal question jurisdiction in this case is that in entering into the lease agreements with Mobil the State of Alabama, acting

through its Department of Conservation, was not acting as a state but rather as a non-state and that since only states can violate the Fourteenth Amendment there could be no violation in this case and consequently no federal question. It is respectfully submitted, however, that only a State can issue or refuse to issue a permit to drill for oil and gas within the State and that the State's refusal to issue such a permit under the uncontested facts in this case is action on the part of the State such as works an irreparable injury to Mobil and unconstitutionally deprives Mobil of its property rights without due process of law.

The remaining portions of the argument will correspond to the numbers and letters used by Petitioners in their Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Decision of the Court of Appeals Is Not in Conflict With Decisions of This Court.

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Supreme Court Rule 19.

The only reason listed in Supreme Court Rule 19(b) which has been mentioned by Petitioners in their petition in support of the Court granting certiorari is that the Fifth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. No other reason has been presented by Petitioners.

The Eleventh Amendment to the United States Constitution does not bar a suit against state officials and agencies named as defendants in this lawsuit because such officials and agencies were acting in violation of the Fourteenth Amendment to the Constitution of the United States.

In the case of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), this Court established the proposition that the Eleventh Amendment to the Constitution of the United States was not controlling in preventing a suit against a state where the act of the state contravened the statutes or Constitution of the United States.

The uncontested facts in this case clearly disclose that a breach of contract vel non on the part of the State of Alabama acting by and through its Department of Conservation is not the determinative issue or the root of the infringement of the Constitutional rights of Mobil in this case. Four leases were sold by the State of Alabama (through its Department of Conservation) to Mobil. These leases granted to Mobil the right to ex-

plore for oil and gas in certain acreages of Mobile Bay. The leases were duly authorized and executed with each lease being for a five year term and as long thereafter as oil or gas might be produced from the leased property. The leases specifically grant to Mobil the right to drill on the property covered by the leases during their terms.

It is not contended by Mobil that the Department of Conservation breached the terms of the leases. It is rather contended that the State Oil and Gas Board, which must issue a drilling permit before drilling can commence, has unconstitutionally refused to issue a permit to Mobil under circumstances where Mobil's application is unquestioned, and where up until the time of Mobil's filing its application for a drilling permit such permits had been issued routinely by the Board's staff as an administrative matter. It is this refusal to issue the permit on the part of the State, acting by and through its Oil and Gas Board, that is claimed to be unconstitutional and against which relief is primarily sought.

Mobil's request that the Department of Conservation extend the terms of its lease prior to commencement of this suit and its prayer for such relief in this suit is asserted merely as a means by which the unconstitutional actions on the part of the State Oil and Gas Board might be remedied.

Only the State Oil and Gas Board can issue or refuse to issue a drilling permit. Under the uncontested facts in this case it is respectfully submitted that the refusal of the State Oil and Gas Board to issue a drilling permit to Mobil to drill on the leased premises has the real and practical result, if permitted to continue, of depriving Mobil of its property right without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. Therefore, pursuant to the authority of *Ex Parte Young*, supra, the Eleventh Amendment to the United States Constitution is not controlling.

The Fifth Circuit Court of Appeals in discussing the Eleventh Amendment defense, pages 16-17 of Petitioner's Petition, clearly noted that "the state's immunity has been held not to shelter state officials from suit when it is claimed that their acts go beyond federal constitutional bounds, whether or not the constitutionality of the state statute is involved."

As further noted by the Court of Appeals:

> "A valid law may be wrongfully administered by officials of the state, and so as to make such administration an illegal burden and exaction upon the individual. *Reagan v. Farmers Loan & Trust Company* (1894), 154 U.S. 362, 14 S.Ct. 1047, 1051, 38 L.Ed. 1014." Other cases in support of this proposition are cited at page 17 of the Court of Appeals opinion.

Respondent submits that the Fifth Circuit Court of Appeals correctly applied this Court's ruling in *Ex Parte Young*, supra, and that the Eleventh Amendment does not bar this action against state officials in federal court.

This Court's decision in *Edelman v. Jordan*, . . . U.S. . . ., 39 L.Ed.2d 662, is not in any way applicable to the facts of this case. In the *Edelman* case this Court granted certiorari to review the question of whether or not a retroactive award of money payable to the Aged, Blind, and Disabled participants in an Illinois program should be allowed. This Court ruled that the District Court correctly exercised pendent jurisdiction over a statutory claim, and that prospective relief was permissible. This Court, however, ruled that retroactive relief of money awards could not be allowed because of the provisions of the Eleventh Amendment.

Mobil's complaint did not seek a monetary award, nor specific performance of a contract. The injunction issued in this case did not have any effect on the State of Alabama's reve-

nues, and did not require state officers to specifically perform. The leases had already been executed and they were completed in all respects.

Authorities will be cited in a later section of this brief in support of the proposition that under Alabama law state officials and agencies can be sued, and such suits are not in violation of Section 14 of the Alabama Constitution, the State Immunity Law.

Since under applicable law as set out in *Ex Parte Young*, supra, and subsequent cases, state officials and agencies can be sued in factual situations as in the case at bar, the decision of the Court of Appeals is not in conflict with other decisions of this Court, but is clearly supportive of this Court's opinions.

II. The Decision of the Court of Appeals Is Not in Conflict With United Mine Workers v. Gibbs, 383 U.S. 715 (1969).

In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1969), this Court, as did the Court of Appeals in its opinion in applying the *Gibbs* case to the factual situation in this case, noted that pendent jurisdiction existed whenever there is a federal claim and the relationship between it and the state claim arise out of a common nucleus of operative fact, and the federal court may adjudicate both claims in a single proceeding without requiring the parties to present the same facts to two different courts. *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148.

The District Court and the Court of Appeals found that there was a substantial federal claim and in the Court's discretion proceeded to grant relief, even though Respondent did not prove to the Court's satisfaction that it was entitled to relief based on its federal claim. The District Court and the Court of Appeals

further found that Mobil's claim against the officials of two state departments were inextricably interwoven and that they arose out of a common nucleus of operative facts.

This Court in *Gibbs*, supra, ruled that the District Court had not exceeded its discretion in proceeding to judgment on the state claim, and the Court of Appeals in the instant case ruled that the District Court had exercised its discretion wisely in determining that the Court had jurisdiction and granting complete relief.

Mobil submits that the instant case is in complete agreement with the finding in this Court concerning "pendent jurisdiction" in the *Gibbs* case, supra.

A. Mobil Oil's complaint did allege a substantial federal question.

The substantial federal question issue has been answered in Section A of this brief, in presenting argument that the District Court was correct in finding that it had federal question jurisdiction. The arguments presented at pages 5 to 12 under Section A are incorporated herein by reference at this point of the brief.

Mobil submits that the case of *Manila Investment Co. v. Trammell*, 239 U.S. 31 (1915), is inapplicable to the facts of the instant case, and that the authority of *Bell v. Hood*, 327 U.S. 678 and the other cases cited in Section A of this brief are controlling. This case involves substantially more than a contract action of the type involved in the *Manila* case, supra, since the *Manila* case was an effort to enforce an executory contract. In this case there was a completed conveyance of a property right which became vested upon the delivery of the lease. The federal question relief sought by Mobil was substantial

and required the Court to do more than merely determine rights under an executory contract. Mobil also sought injunctions against the Oil and Gas Board and its officials from refusing to issue drilling permits, sought an order directing the Oil and Gas Board to issue drilling permits and further sought an injunction against all defendants enjoining each of them from interfering in any way with Mobil's application to drill and the actual drilling of a well or wells in Mobile Bay.

The District Court found that it was clearly contemplated by the parties at the time the subject leases were made that Mobil would have the right to drill. The Court noted that it would indeed be a strained construction of the lease arrangements to arrive at a conclusion which would in effect hold that the plaintiff received, and the defendant State Department of Conservation gave no more than a lottery ticket, a chance, for the right to drill for oil and gas. The Court further noted that in reliance on the right to drill granted in the leases Mobil expended large sums of money, had pursued all avenues of relief available to it, and had fulfilled its obligations under the leases.

The Court noted further:

> "Since Mobil has been *deprived of the right* contemplated by the lease agreement, it is the opinion of this Court that, as a matter of equity, and to prevent unjust enrichment of the state, Mobil is entitled to have the terms of the leases stayed for the period which it is delayed in obtaining drilling permits by reason of the actions, or inaction of the Oil and Gas Board of the State of Alabama." (Emphasis added).

The above is clearly factual findings and discussions of alleged facts that show a violation of Mobil's "due process" rights. Petitioners are in error in stating at pages 9 and 10 of

their Petition that there were no factual findings or discussions indicating a possible violation of due process. Mobil submits that the fact that one state agency received in excess of $118,-000.00, contemplating that Mobil would be able to drill, and another state agency precluded Mobil from drilling, constitutes a patent example of a party being unconstitutionally deprived of its property rights without due process.

B. The State Immunity Clause as contained in Section 14 of the Alabama Constitution does not prohibit the District Court from entertaining this action.

Petitioners, in argument and brief in the Court of Appeals, stated that Section 14 of the Alabama Constitution prohibits the District Court from entertaining this action. This argument has also been made to this Court at pages 10 and 11 of Petitioner's petition. The District Court was presented full briefs on state law, to the effect that the Supreme Court of Alabama has determined that Section 14 of the Alabama Constitution is not applicable where a suit is brought against a state official or agency acting beyond his or its scope of authority or acting illegally, in bad faith, or fraudulently, *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So.2d 479 (1942); and further that Section 14 is not applicable where a suit is brought against a state officer or agency to enjoin arbitrary action or abuse of discretion to prevent irreparable damage. *State of Alabama v. Norman Tobacco Co.*, 273 Ala. 420, 142 So.2d 873 (1962).

Mobil's complaint most assuredly alleges bad faith and fraudulent actions on the part of the State Attorney General and the fact that the District Court found that, in its opinion, the Attorney General had not acted fraudulently or in bad faith, would not retroactively destroy jurisdiction. *Wright, Federal Courts* (1963), page 55, cited above at page 6 of this brief.

Mobil's complaint further alleges arbitrary action on the part of the State Oil and Gas Board in refusing to grant the permit even though Mobil had complied with all the rules and regulations of the Board, and even though the Board had historically routinely granted permits to drill administratively.

Mobil also alleges in its motion for preliminary injunction that unless the Appellants were restrained that Mobil would suffer irreparable injury and harm. Facts in further support of the irreparable injury and harm which would be sustained by Mobil are fully shown in the verified complaint and by testimony presented at the hearing on Mobil's motion for preliminary injunction.

Mobil's complaint also alleged that the Petitioners were by their actions or inaction taking Mobil's property without due process of law and on this particular point the Alabama Supreme Court has declared in *Engelhardt v. Jenkins*, 273 Ala. 352, 141 So.2d 193, that:

> "The bill alleges an unauthorized procedure on the part of Appellant—the taking of private property in violation of the owners' constitutional right of compensation. Though the alleged taking was for the benefit of the state, such action, as alleged,' was without 'authority of law. *Even the state could not authorize an unlawful taking.*" (Emphasis supplied.)

In the *Engelhardt* case, supra, Jenkins brought an action seeking damages and an injunction against the State Highway Director from taking land without a proper condemnation proceeding and payment of just compensation. The single question presented was whether or not this was a suit against the State in violation of Section 14 of the Alabama Constitution. The State Highway Director confined his argument to this one point. The Court stated that if property was taken without proper condemnation proceeding and without paying

just compensation therefor "this is taking private property by the State without due process in violation of both State and Federal Constitutions—Sections 23 and 235, Alabama Constitution, 1901; United States Constitution, 14 Amendment, Section 1."

It is therefore clear under the facts alleged in Mobil's complaint and under the Alabama authorities cited above that Section 14 of the Alabama Constitution does not defeat this suit, and a federal court has jurisdiction.

Mobil submits that it is not necessary for the District Court to cite applicable state law in so applying that law to the facts of this case. The District Court applied applicable state law principles in deciding the state issues present in the case. Petitioners have not argued that the trial court decided the case in conflict with Alabama law.

C. **Petitioners were not denied fairness as litigants.**

Mobil Oil did not set out to invoke a Federal Court's pendent jurisdiction. Mobil stated a substantial federal question in its complaint, as is noted by both the District Court and the Court of Appeals in their respective opinions. The fact that the District Court did not find that Mobil was entitled to the federal relief prayed for, does not defeat the Court's jurisdiction. Under the authority of *Engelhardt v. Jenkins*, supra, *Curry v. Woodstock Slag Corp.*, supra, and *State of Alabama v. Norman Tobacco Co.*, supra, the result of the case would have been the same, applying the above cited Alabama cases.

Federal courts can decide state questions, if the relationship between the federal claim and the state claim dictates the conclusion that the entire action in the federal court comprises but one constitutional "case". *United Mine Workers v. Gibbs*, 383 U.S. 715, 725.

It was absolutely unnecessary for the Court of Appeals to remand this case to the District Court for application of Alabama law, since the findings of the District Court is completely compatible with applicable state law.

D. **Federal-State comity was not impaired.**

The judicial economy, convenience and fairness to litigants all required that this case be tried at one time, and that both federal and state claims be litigated in one "case". The state and federal claims presented by Mobil had a common nucleus of operative fact, and the District Court correctly decided the issues presented by the complaint and evidence. The state law concerning the right to sue state officials and agencies for acting beyond the scope of their authority, acting illegally, in bad faith or fraudulently, to enjoin arbitrary action, abuse of discretion, to prevent irreparable damage or to stop the taking of private property in violation of the owners' constitutional right of compensation are all grounds for relief in either the Alabama state court or federal court based on applicable state law.

E. **The District Court had diversity jurisdiction to entertain this suit against officers and agencies of the State of Alabama.**

It is respectfully submitted that the District Court was entirely correct in its finding that federal question jurisdiction exists in this case and for that reason no arguments by either the Petitioners or the Respondent relating to diversity jurisdiction need be considered by this Court. The issue of federal question jurisdiction was properly decided by the District Court, and, as correctly asserted by the District Court, once federal question jurisdiction has been found to exist, the question of diversity jurisdiction need not be reached. It is therefore submitted that the Petition for Writ of Certiorari should be denied

without considering diversity arguments and that the Opinion of the Fifth Circuit Court of Appeals should be affirmed.

In arguendo, however, Mobil will discuss the relative merits of diversity jurisdiction in this cause.

Although the District Court did not specifically rule on the question of diversity jurisdiction the findings of fact clearly disclose that there were ample grounds on which diversity jurisdiction could have been sustained pursuant to 28 U.S.C. 1332.[3] The District Court found, and the fact is not contested by the Petitioners in their Petition for Writ of Certiorari that Mobil Oil Corporation "is a New York corporation with its principal place of business being located in New York and is qualified to do business in the State of Alabama." The District Court further found that "the defendants, Claude Kelley, William J. Baxley, Drexel Cook, Julian Maddox, Ralph Adams, and Philip E. LaMoreaux, are each over the age of 21 years of age and are *citizens* of the State of Alabama." (Emphasis added.) Under these findings of uncontested facts, it clearly appears that each of these named defendants were *citizens* of the State of Alabama and that Mobil Oil Corporation is a *citizen* of the State of New York, thus giving rise to diversity.

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[3] 28 U.S.C. 1332 DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and foreign states or citizens or subject thereof; and

(3) citizens of different states and in which foreign states or citizens or subject thereof are additional parties.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

The only question remaining to be answered here would be that of whether the Defendants-state agencies (the State Oil and Gas Board and the Department of Conservation) would negate diversity by being construed to be one and the same as the State of Alabama. The question has been met head on by the Fifth Circuit in the case of *Board of Supervisors of Louisiana State University and Agricultural and Mechanical College v. Ludley*, 252 F.2d 372 (Fifth Cir. 1958), where the Board of Supervisors of LSU were sued by a Negro student seeking admission. There, an amendment to the State Constitution specifically sought to make the defendants (the Board of Supervisors of LSU and the Louisiana State Board of Education) special agencies of the state and withheld consent of the State of Louisiana to suits against the State through those defendants and their officers. In deciding this question the Fifth Circuit Court of Appeals stated:

> "These suits are not suits against the State of Louisiana, and no amount of assertion that they are can make them so. *Full relief can be obtained from the named defendants without requiring the State to take any affirmative action. This is the test.*" Page 376. (Emphasis supplied.)

This decision has been cited with approval and used by the District Court of the Northern District of Illinois in deciding *Patterson v. City of Chicago*, 176 F.Supp. 323 (1959), wherein that District Court cited with approval the above test, and further pointed out at page 324 that "another criterion frequently applied is that the state immunity operates only when the state itself rather than the entity named as defendant will have to respond to a judgment."

Mobil could have obtained relief by the Court either ordering the Oil and Gas Board to issue a drilling permit or ordering a suspension of the leases entered into between the Department of Conservation and Mobil, until such time as the permit was issued. Whereas the latter mode of relief was granted by the

District Court, either form of relief could have been rendered against the named defendants without requiring the State of Alabama to take any affirmative action whatsoever. Further, no monetary damages were sought in this lawsuit, and therefore there was no danger whatsoever that the State of Alabama itself would have to respond to any judgment of the Court.

Under the findings of fact as set forth by the District Court and as uncontested by the Petitioners in the Petition for Writ of Certiorari and under the test established by the Fifth Circuit Court of Appeals to determine whether a suit against a state agency is a suit against the state, it is submitted that diversity jurisdiction affirmatively exists. Mobil is a citizen of the State of New York, the individually named defendants are citizens of the State of Alabama, and the State agencies named as defendants meet the test of *Board of Supervisors of LSU v. Ludley*, supra, in that the prayer for relief can be obtained from those defendants without requiring the State of Alabama to take any affirmative action whatsoever.

In summary as to diversity, Mobil submits that even should this Court find that the District Court erred in finding federal question jurisdiction, such error was without injury as diversity jurisdiction is present in this suit, and the District Court correctly decided the issues presented.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the United States District Court for the Southern District of Alabama had jurisdiction in this case, and the United States Court of Appeals for the Fifth Circuit correctly ruled that the District Court had jurisdiction in this case, and the Fifth Circuit Court of Appeals order affirming the jurisdiction of the District

Court should be affirmed, and Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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